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April 25, 2022

Secretary Vanessa A. Countryman
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090
Submitted by email to rule-comments@sec.gov

RE: File Numbers S7-03-22

Dear Secretary Countryman:

The Predistribution Initiative (PDI) appreciates the opportunity to respond to the Securities and Exchange Commission (Commission or SEC) request for comment in connection with the Investment Advisers Act Release No. 5955 (February 9, 2022) which proposes new rules and amendments under the Investment Advisers Act of 1940 that would expand the regulatory framework to which private fund managers are subject (Private Fund Proposal).

PDI is a nonprofit research organization focused on supporting investors in measuring and managing their exposure to systemic and systematic risks. PDI team members have significant experience in finance, economics, corporate law, and fund formation, with a significant concentration on responsible investing in private equity and related private asset classes. Members of our team have worked for private equity investment firms, served in governance and investment roles at global public pension funds, co-founded the Impact Management Project, served on working groups and committees of standard setting bodies such as the Sustainability Accounting Standards Board (SASB) Standards Advisory Group, structured deals with environmental, social, and governance (ESG) considerations, worked at Bear Stearns during the Global Financial Crisis, among other experiences that shape our feedback. As outlined in our March 2022 response to this proposal, our work uniquely explores the complex intersections between ESG and impact investing issues with investment structure and market structure factors. This analysis, largely captured in our working paper, ESG 2.0: Measuring & Managing Investor Risks Beyond the Enterprise Level, shapes our comments, and builds on our comment letter dated March 21, 2022 relating to both the Private Fund Proposal and the SEC's separate proposal on Form PF.

We are generally supportive of the Private Fund Proposal and believe that the Commission provides sufficient evidence to justify improved guardrails on the topics covered. While we applaud the SEC for recognizing the importance of these issues and acting with a sense of urgency to address them, we also acknowledge that the proposals are quite complex, and adequately assessing their potential benefits and unintended negative consequences within the time period the Commission has allowed is a challenge. We urge the Commission to be mindful of potential unintended negative consequences, such as overburdening smaller, emerging, and diverse fund managers with requirements that will inhibit their ability to grow and compete with industry incumbents. As we outline in our aforementioned ESG 2.0 working paper, the negative impacts and market risks resulting from fund manager consolidation include procyclical investment patterns that can lead to asset bubbles, credit crises, and an increasing divergence between the "real economy" and financial markets. Given the SEC's tripartite mission to "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation," balancing appropriate investor protections in the Private Fund Proposal with the other two elements of the SEC's mandate will require thoughtful rulemaking in this regard.

PDI is currently pursuing parallel efforts to the SEC regarding improved disclosure from private funds which we hope can contribute to ongoing improvements to provisions in the Private Fund Proposal. The topics covered in our efforts include fees, expenses, reporting on performance and valuation, managing conflicts of interest, debt load, asset stripping, tax responsibility, lobbying and political spend, stakeholder engagement, initiatives to grow new or undersupplied markets, among others. This process entails curating convenings and feedback mechanisms for diverse stakeholders - including asset owners and allocators, asset managers, other financial intermediaries, labor advocates, civil society, academics, and policy makers and regulators – to co-create disclosures and best practice guidance and fine-tune them together. This process demands modes of consultation beyond what the Commission is likely positioned to manage itself; that is, we are hosting convenings with facilitated dialogue; producing surveys; and iterating on draft metrics, disclosures, and guidance on best practices to build consensus and avoid unintended negative consequences. PDI is stewarding this process to build out a dimension of voluntary framework tools with several industry organizations, including through the emerging Task Force on Inequality-related Financial Disclosures ("TIFD") and a separate collaboration that we started with the Impact Management Project ("IMP") that is continuing with their partner, Impact Frontiers (you can read more on this project here). We are glad to keep the Commission and other interested parties informed of these activities and learnings which we hope can help inform improved policy and regulatory rule making.

With that said, we are mindful to not let "perfection be the enemy of the good" and therefore are writing to encourage the SEC to proceed with approving the proposed rules, with some additional suggestions and caveats based on consultations that have taken place to date, as described in the following pages.

Quarterly Statements

PDI supports the principles-based approach to require quarterly reporting, which would allow for sufficient flexibility to apply to the full breadth of private fund strategies as well as accommodating the evolution of these products and market practices over time.

Requiring fund-level disclosures would create a helpful minimum standard. However, for many limited partners (LPs), fund-level disclosures alone would be insufficient for their own monitoring and reporting requirements and would be a regression from the level of reporting many LPs currently receive. We encourage the SEC to consider expanding the rule to require general partners (GPs) provide LP-level reporting upon investors' request. The SEC should ensure that fund-level reporting is a "floor, not a ceiling."

We believe the proposed distribution requirement of 45-day post quarter close is appropriate for traditional private equity managers. We recommend that fund of funds and secondary managers be provided additional time to prevent routine instances of providing previous quarter-end data to fulfil SEC requirements.

The content of potential quarterly disclosures should include all essential information about the fund, including its holdings, valuations, performance, and fee and expense information. Additional specificity on definitions of fees, expenses and offsets or methodologies used in performance reporting requirements could be addressed through ongoing staff guidance dispensed through Division of Examinations Risk Alerts and SEC examination activities.

If this is deemed to be potentially too burdensome for some smaller advisers, we urge the Commission to at least consider this requirement for all fund advisers with greater than $1 billion in assets under management.

Fee and Expense Disclosure

PDI supports the development of standardized definitions and a taxonomy to support comparisons on costs and to avoid the current practice of categorization of costs as "other." At the same time, we recognize that such standardization may be challenging where underlying assets or strategies are fundamentally discrete. The Institutional Limited Partners Association (ILPA) has conducted significant work on fee and expense disclosure, and we recommend that the Commission's rules conform with established standards, including but not limited to ILPA. While ILPA has made significant progress in their support of LPs securing more information from GPs, mandating disclosure aligned with ILPA guidance would result in a level playing field and reduce the cost burdens of individual LPs in their attempts to secure and analyze any information provided.

Performance Disclosure

PDI supports requiring performance metrics disclosed without the impact of any fund-level subscription facilities, but such disclosures would be most useful if provided alongside metrics *with* the impact of subscription facilities to allow for a more complete picture of the impacts of a fund's financing strategies. Additional periodicities should be provided in addition to Inception to Date (ITD) –namely Calendar Year to Date (CTYD) and Inception to Prior Year's End.

PDI is supportive of moving to a standardized methodology on performance disclosures over time. However, today individual LPs have specific preferences as to what is or is not included in net figures and whether additional valuation methodologies to IRR and MOIC or TVPI are used. For instance, the American Federation of Teachers (in their comment letter to the Commission dated April 11, 2022) makes the case for certain methodologies based on a public market equivalent (PME) analysis.

As such, we suggest the SEC should clarify that investors would continue to be able to negotiate for preferred performance reporting formats in addition to the SEC required format. In the interim, setting more concrete minimum standards for disclosure of the assumptions and methodology used would be beneficial to LPs.

Mandatory Private Fund Adviser Audits

PDI is supportive of the annual audit requirement. However, we recommend that the scope of the fund audit be expanded to include LP capital account statements, fund-level fee and expense information, and the compliance of such charges against the LPA.

Adviser-Led Secondaries

PDI generally supports these proposals, though recognizes that LPs generally deem fairness opinions as procedural comfort rather than true assurance of fair pricing. Other methods, such as through a third-party transaction or an arms-length transaction through a minority stake sale to another adviser are perceived to yield more valuable information on the fairness of price offered.

We recommend that the SEC should clarify the timing around the provision of the pricing information to investors. As written, "prior to the closing of the transaction" does not ensure sufficient time for LPs to act on the information in the decision. We also recommend that the SEC consider targeting other elements of Adviser-led Secondaries beyond pricing that can lead to a conflict of interest, including the terms of the deal, age and status of the assets included, timing provided to Limited Partners Advisory Committee (LPAC) and LPs, information provided to LPAC and LPs, and voting structure for LPAC.

We support the suggestion proposed by Healthy Markets Association in their April 15, 2022 comment to the SEC that, "if the Commission wishes to reduce the potential burdens on investment advisers of obtaining and distributing fairness opinions, the Commission could impose the requirement on registered investment advisers only, and apply it to transactions exceeding the lesser of (1) a total notional value of greater than $100 million or (2) 10% of total fund assets."

Prohibited Activities

Fees for Unperformed Services
PDI is supportive of the provision regarding fees for unperformed services. GPs should not be able to charge a fund or a portfolio investment for unperformed services.

Certain Fees and Expenses
PDI is supportive of this provision and recommends that all compliance costs associated with the adviser's operation of the fund should be borne by the GP, that any compliance costs should be disclosed and transparent to all LPs, and that the SEC should make it clear that the result of any regulatory exam or review is a compliance cost to be borne by the GP.

Reducing Adviser Clawbacks for Taxes
PDI is supportive of this provision, as prohibiting an adviser from reducing the amount of any clawback by any actual, potential or hypothetical tax rate would improve alignment of interest between LPs and GPs. If the proposed provision as written does not move forward, a more rational hypothetical marginal tax rate may make sense, provided the rate is that which applies to the individual members of the adviser impacted.

Limiting or Eliminating Liability for Adviser Misconduct
PDI is generally supportive of reining in practices in fund documentation that shift risk burdens to the fund's LPs, reduce the standards of care or loyalty, give the GP sole discretion to consider own interests above those of the fund, and leave the GP bearing little to no accountability, even for malfeasance or gross negligence. While its inclusion would strengthen alignment, the ordinary negligence standard may be untenable. PDI is amenable to removing "negligence" and instead substituting "gross negligence" and asserting that the negligence standard should apply in cases of material breach of the limited partner agreement (LPA) and side letters. The SEC should clarify that any penalties or disgorgements resulting from an enforcement action that terminates in a

settlement, as opposed to a court finding, would be borne by the GP and not indemnifiable.

Certain Non-Pro Rata Fee and Expense Allocations
PDI is generally supportive of this provision, but requests that the SEC clarify how this provision would impact separately managed accounts (SMAs) and Fund of Ones. It would also be helpful for the SEC to delineate between how this would apply to co-investors (i.e., syndication) and co-underwriters.

Borrowing (prohibition on GPs borrowing from the fund)
PDI is generally supportive of this provision. However, we are supportive of the suggestion included in the comment letter submitted by Healthy Markets Association submitted April 15, 2002, “There are clearly significant opportunities for abuse. At the same time, a fund investor may be well-positioned to provide credit in various forms to a private fund adviser. In this regard, rather than simply prohibiting all extensions of credit by fund investors to a private fund adviser, we recommend that that Commission require (1) a fairness opinion regarding the terms of the extension of credit, and (2) disclosure of the terms of the extension of credit to other investors in the same fund or funds in which the lender participates. This disclosure could give notice to other investors of a potentially improper relationship between the lender and the private fund adviser.”

Preferential Treatment

We agree with statements made in other comment letters, including for instance, that submitted by Meketa Investment Group on March 21, 2022, that the prohibitions detailed in the proposed rules would likely benefit LPs by reducing the time and money spent on legal negotiations with advisers when committing to invest in a private fund. We are also in agreement with Meketa that on the other hand, “adherence to the proposed rules may be more difficult for smaller firms and may inhibit the ability of emerging managers to use preferential terms as a means of securing anchor investors. We believe that it is important to support smaller, emerging firms, particularly as innovation in important areas such as ESG and DEI often come from smaller organizations.” PDI therefore encourages the SEC to be thoughtful about rulemaking in this regard.

Prohibition on Preferential Redemption Rights
PDI recommends that the Commission consider limiting the scope of this provision to open-ended funds, with an exemption for LPs who must redeem/liquidate in the event of a policy/statute violation. When individual investor redemptions in the close-ended fund space do occur, internal organizational considerations at the investor are normally the reason for such redemptions as opposed to commercial reasons.

Prohibition on Preferential Disclosure of Certain Portfolio Company Information

PDI is generally supportive, but encourages the SEC to make clear that in this context, providing ESG information regarding portfolio holdings does not have a material adverse effect on other investors in the fund. PDI also encourages the SEC to consider the unintended consequence of creating a universal minimum requirement for portfolio level disclosures for institutions subject to public records act requirements, to avoid portfolio information becoming public in violation of non-disclosure agreements (NDAs) or exposing commercially sensitive information to bad faith requests.

Disclosure of any Preferential Treatment
While we support greater transparency in the industry, PDI is concerned that the rule may have unintended consequences. Side letters are critical for many institutional investors; many LPs rely on side letters for statutory, regulatory or legal requirements. We encourage the SEC to clarify in the final rule that institutional investors would still be able to enter side arrangements with private fund advisers. A 'best in class' Most Favored Nation (MFN) process may achieve the proposed rule's policy goals without imposing a documentation burden that is not actionable for LPs and may create delays in the negotiation process or impede GPs' willingness to grant certain terms. A well-run MFN process provides LPs with the requisite transparency necessary for both informed investor decision making and improved investor outcomes and also includes a compendium of all terms, provided to all LPs in a timely fashion even if investors do not have the capital commitment required to elect such terms.

We agree with other recommendations that the SEC collect and share appropriately aggregated and anonymized information about fees and returns with researchers, policy makers, and the public. These public disclosures would add another layer of accountability for all actors in the system and would also provide private fund investors with additional insights into what they are being charged relative to others' and into the performance of PE investments.

Additionally, PDI supports consideration of an extended implementation timeline for smaller or newer managers that require more time to modify practices to comply with the rules, as determined through specific parameters or a combination thereof such as assets under management, headcount, or maturity of the platform.

We hope our comments are helpful. At PDI, we will continue to consult with both GPs and LPs, as well as civil society and academics, to better understand their needs and limitations through our projects and welcome ongoing dialogue with the SEC to inform improved policy making and regulation.

Kind regards,

Delilah R. Rothenberg
Co-Founder & Executive Director, Predistribution Initiative